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Supreme Court, U.S.
FILED
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No. 97-556

In The

Supreme Court of the United States

October Term, 1996

SUNDSTRAND CORPORATION,

Petitioner,

vs.

RONALD BLACKBURN and BARBARA BLACKBURN,

Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit

RESPONDENTS' BRIEF IN OPPOSITION

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23 pp

QUESTIONS PRESENTED

1. May a motion filed at the end of a state court personal injury suit, seeking to enforce a state law governing apportionment of the proceeds, be removed to federal court on the theory that ERISA conflict preemption creates a federal defense to the state law claims and so warrants the exercise of federal question jurisdiction?

2. Does ERISA enable an employee benefit plan to recover proceeds of a state tort suit from one of its beneficiaries without paying the attorney fees and other legal expenses that were needed to recover the tort damages as required by the state common law doctrine of common fund regardless of whether the subrogation language in the plan documents provides for recovery without deduction of fees or is silent regarding the deduction of fees?

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STATUTES INVOLVED

The following statute is in addition to those cited and set forth verbatim in petitioner's petition:

28 U.S.C. § 1331 states as follows:

> § 1331. Federal question
>
> The district courts shall have original jurisdiction of all civil actions arising under the Constitution, laws, or treaties of the United States.

STATEMENT OF THE CASE

A. Facts

The facts in this case are derived from the respondents' petition to adjudicate subrogation claim and petitioner's notice of removal. *App. A and App. B respectively.*[1] No evidence or testimony was presented in the district court. And, petitioner never made its subrogation provision or plan documents part of the court record.

Respondents suffered injuries in a motor vehicle collision. At the time of the collision, they were covered by petitioner's ERISA employee benefit plan. The plan paid $25,831 in medical expenses for their treatment. Petitioner claimed subrogation rights.

In seeking compensation for their losses, respondents retained legal counsel. They entered into the standard contingency fee contract, agreeing to pay their attorneys one-

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1. References to the Appendix are cited as "App. __."

third of any settlement, plus reimbursement of expenses. Their attorneys filed a personal injury lawsuit in Illinois state court against the tortfeasor. During the course of the litigation process, the respondents became liable for $1,125.87 in litigation expenses needed by their attorneys to prosecute the lawsuit against the tortfeasor.

The respondents' attorneys successfully concluded the litigation short of trial. Respondent Ronald Blackburn's recovery was $100,000 and respondent Barbara Blackburn's recovery was $5,000. The settlement of the lawsuit was obtained entirely through the legal efforts and financial expenditure of the respondents' counsel. At no time did petitioner or its attorneys ever aid or otherwise contribute to the creation of the settlement. Petitioner did not intervene in the lawsuit or file its own lawsuit. In sum, the respondents' counsel created a fund in the amount of $105,000 for their clients after successfully concluding the civil litigation.

Respondents' counsel advised petitioner that in satisfaction of its subrogation rights, his clients would reimburse petitioner less attorney fees of one-third and a pro rata share of litigation expenses in accordance with the Illinois common fund doctrine.

In response, petitioner refused to pay any attorney fees and litigation expenses on its subrogation recovery, but instead wanted to be reimbursed at no expense. Petitioner insisted that, regardless of a state law that protects insured parties against insurers who seek to deprive them of compensatory damages gained through tort litigation by demanding litigation proceeds without taking account of the cost of the litigation, ERISA gives employee benefit plans the unconditional power to enforce subrogation clauses against their beneficiaries.

B. Proceedings Below

Shortly thereafter, counsel for the respondents filed a verified petition in their personal injury lawsuit requesting the court to reduce petitioner's subrogation recovery by one-third plus a proportionate share of litigation expenses. *App. A.* In their petition, respondents acknowledged the existence of petitioner's subrogation rights and sought application of the Illinois common fund doctrine to reduce petitioner's recovery. *App. A.* Petitioner responded by filing a notice of removal to federal district court. *App. B.* In this regard, petitioner contended that, because Illinois law was allegedly in conflict with ERISA, its preemption defense created federal question jurisdiction. Although petitioner relied on its subrogation provision to require full reimbursement, it never made the plan documents or the terms of the subrogation provision part of the court record.[2]

Notwithstanding the absence of any factual record showing that the subrogation clause required that state law be overridden, the district court gave judgment for petitioner. *Blackburn v. Sundstrand Corporation*, 933 F. Supp. 724 (N.D. Ill. 1996). It did not discuss the issue of federal jurisdiction, but rather assumed that jurisdiction was appropriate under ERISA. Turning to the issue of preemption, it recognized that because the Illinois common fund doctrine is not an anti-subrogation law, its application was not precluded by this Court's decision in *FMC Corporation v. Holliday*, 498 U.S. 58 (1990). But the court felt compelled by a dictum in a Seventh Circuit decision, *Land v. Chicago Truck Drivers, Helpers and Warehouse Union Health and Welfare Fund*, 25 F.3d 509 (7th Cir. 1994), to conclude that ERISA supersedes the common fund doctrine. Finally, it refused to follow several decisions by other district courts in the Seventh

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2. Petitioner misstates the record at page 3 of its petition where it states the subrogation provision entitled it to full reimbursement. There is no evidence in the record that the terms of the subrogation provision provided for full reimbursement.

Circuit which, under federal common law, adopted an interpretive principle pursuant to which subrogation clauses would be enforced consistent with the common fund doctrine absent clear language in the plan documents overriding that doctrine. Rather, it placed the burden on respondents to show that language in the subrogation clause permitted them to deduct attorney fees before repaying medical expenses.

In a unanimous decision authored by Judge Easterbrook, the court of appeals reversed. It first noted the district court's failure to discuss the sources of subject matter jurisdiction, and found that there was no jurisdiction. *Blackburn v. Sundstrand Corporation*, 115 F.3d 493 (7th Cir. 1997). It noted that in *Franchise Tax Board of California v. Construction Laborers Vacation Trust*, 463 U.S. 1 (1983), this Court had held that preemption defenses under ERISA does not create federal jurisdiction. This case, Judge Easterbrook concluded, involved conflict preemption under ERISA section 514(a), not complete preemption of a state law claim that actually depends on ERISA as in *Metropolitan Life Insurance Company v. Taylor*, 481 U.S. 55 (1987), and accordingly the proffered preemption defense did not create a basis for removal.

Moreover, the court held, removal based on preemption was improper because the Illinois common fund doctrine was not preempted.[3] Judge Easterbrook provided two reasons for this conclusion. First, the common fund doctrine predates ERISA

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3. The Illinois common fund doctrine permits a party who creates, preserves or increases the value of a fund in which others have an ownership interest to be reimbursed from that fund for attorney fees and litigation expenses. *Brundidge v. Glendale Federal Bank FSB*, 168 Ill. 2d 235, 238, 659 N.E. 2d 909, 911 (1995). It is a common law rule of general application which does not single out or refer to ERISA plans, but rather applies to all funds created, increased or preserved by a party in which others have an ownership interest. *Scholtens v. Schneider*, 173 Ill. 2d 375, 386, 671 N.E. 2d 657, 663 (1996).

and was not directed at employee benefit plans; it does not "relate to an employee benefit plan" as required for the application of section 514(a). Second, the Illinois common fund doctrine represents a sensible way of ensuring that petitioner pay for the benefit of receiving reimbursement under its subrogation clause. For example, had petitioner hired its own counsel to pursue the tortfeasor who caused respondents' injuries, it could not have argued that ERISA preempted its contractual obligation to pay its own lawyer. And yet, if preemption of the common fund doctrine meant that injured persons could not charge legal costs against their recoveries, they would be encouraged to refrain from demanding medical expenses in tort suits, thus forcing plans to hire their own counsel to enforce such claims.[4]

The court noted that it was not addressing the question of whether an employee benefit plan could word its plan documents in a way that avoided the common fund doctrine. If the

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4. The following illustrations based on a $20,000 liability insurance coverage limit, settlement for the $20,000 coverage limit, $12,000 in medical expenses, $1,000 in litigation expenses and standard one-third contingency fee contract are contained at page 23 of respondents' brief to the Seventh Circuit. Without the common fund doctrine, there are the following recoveries:

Plan	12,000.00
Attorney Fee	6,666.00
Expenses	1,000.00
Victim	334.00

In contrast, application of the common fund doctrine would provide the following recoveries:

Plan	7,400.00
Attorney Fee	6,666.00
Expenses	1,000.00
Victim	4,934.00

subrogation provision contained express language requiring participants to seek to recover medical costs from tortfeasors and requiring them to waive application of the common fund doctrine, a state might be precluded from overriding such specific language. But because those facts were not presented in this case, the court left that question to another day.

REASONS FOR DENYING THE WRIT

As in many states, Illinois common law of insurance has developed a means of protecting insured parties against unduly harsh enforcement of subrogation clauses by requiring that, when an insured recovers compensatory damages which include the medical expenses which their health insurance has paid, the insurer's subrogation claim is subject to the same limitations as the injured party — that is, the requirement of paying the costs of securing the recovery. And far from the decision below being in conflict with the run of decisions in other federal and state courts, as petitioner contends, the courts have developed a fairly broad consensus that, in the absence of subrogation language specifically overriding common law doctrines protecting the insured, those protections must be honored. Nothing in the record shows that this general rule was improperly applied here. And other federal courts have not held, as petitioner contends, that ERISA preemption defenses based on section 514(a) create federal jurisdiction and that ERISA preempts a state common fund doctrine. Thus, because there is no conflict neither among the lower courts nor between the decision below and previous decisions of this Court, and because petitioner failed to provide a factual basis on which the consensus rule on the construction of subrogation provisions could be applied, the petition for a writ of *certiorari* should be denied.

Before any consideration of whether this Court should grant the petition concerning ERISA's preemptive scope over a state

common fund doctrine or whether application of the common fund doctrine was appropriate based on the factual record, this Court must first conclude federal jurisdiction exists. Clearly, petitioner's defense against the respondents' state court apportionment proceeding is ERISA's supersedure provision found in section 514(a). This Court in *Franchise Tax Board of California v. Construction Laborers Vacation Trust*, 463 U.S. 1 (1983) reiterated well established federal jurisdiction law. Where no diversity of citizenship jurisdiction exists, as in the present case, the propriety of removal turns on whether the case falls within the scope of the original federal question jurisdiction under 28 U.S.C. § 1331. *Franchise Tax Board*, 463 U.S. at 8. This Court in *Franchise Tax Board* stated that under the "well pleaded complaint" rule as articulated in *Louisville & Nashville Railroad Company v. Mottley*, 211 U.S. 149 (1908), a defendant may not remove such a case to federal court unless plaintiff's complaint shows that the case arises under federal law defined by section 1331, and it may not be removed on the basis of a federal defense. *Franchise Tax Board*, 463 U.S. at 10. *Franchise Tax Board* held that removal on the basis of a federal defense, specifically ERISA section 514(a) preemption, does not confer federal subject matter jurisdiction. *Franchise Tax Board*, 463 U.S. at 13-14. Since this Court has previously considered whether ERISA section 514(a) confers complete preemption jurisdiction and has declined such an extension, there is no reason for the Court in this case to reconsider its previous ruling, especially since no conflicts exist among the lower courts.

There are no conflicts among the circuits over federal common law providing for a basis of federal jurisdiction in conflict preemption removal under ERISA section 514(a). In *Ryan v. Federal Express Corporation*, 78 F.3d 123 (3d Cir. 1996), the Third Circuit failed to consider altogether state law and ERISA's preemptive scope of it under section 514(a). Preemption was not even an issue in the case. Rather, the court

and the parties believed federal common law was at issue and the case was decided on that basis. *Bollman Hat Company v. Root*, 112 F.3d 113 (3d Cir. 1997) is not a removal case. Consequently, conflict preemption jurisdiction under ERISA is not an issue. In *Bollman Hat Company*, the ERISA plan brought suit in federal district court seeking full reimbursement for its subrogation recovery. The Third Circuit found federal jurisdiction under federal common law because the terms of the subrogation provision were in dispute, that is, whether an ambiguity existed. *Bollman Hat Company*, 113 F.3d at 116. In the present case, petitioner did not even bother to place the plan documents or the subrogation provision into evidence. No court in this case has seen the subrogation provision, let alone interpreted it. Consequently, federal common law in the present case is inapplicable. The Eight Circuit's decision in *Mohame v. Kerr*, 53 F.3d 911 (8th Cir. 1995) does not conflict with the present case. Conflict preemption was not an issue because potential beneficiaries were seeking benefits under the ERISA plan. Consequently, the court had jurisdiction under ERISA section 502(a)'s complete preemption jurisdictional doctrine. *Metropolitan Life Insurance Company v. Taylor*, 481 U.S. 58 (1987).

The present decision is not the case to accept *certiorari* to determine whether a defense of ERISA conflict preemption in a state court apportionment proceeding warrants an extension of federal question jurisdiction because there is an incomplete factual record (subrogation provision and plan documents absent from the record) and resort to federal common law was not required. Furthermore, conflicts do not exist among the circuit courts over federal common law providing a basis for federal question jurisdiction in ERISA conflict preemption cases.

No conflicts exist among the circuit courts over ERISA preempting a state common fund law. Cases cited by petitioner,

Barnes v. Independent Automobile Dealers Association of California Health and Welfare Benefit Plan, 64 F.3d 1389 (9th Cir. 1995) and *Waller v. Hormel Foods Corporation*, 120 F.3d 138 (8th Cir. 1997) are "make whole doctrine" cases, not common fund doctrine cases. The make whole rule, which prohibits enforcement of subrogation clauses, is substantially different that the common fund doctrine. This difference was noted by Judge Easterbrook in the present case. The common fund doctrine does not prohibit the enforcement of subrogation. The make whole doctrine, on the other hand, is analogous to the anti-subrogation statute preempted by this court in *FMC Corporation v. Holliday*, 498 U.S. 52 (1990). *Ryan*, *Bollman Hat Company* and *Cagle v. Brunner*, 112 F.3d 1510 (11th Cir. 1997) are not ERISA preemption cases and consequently cannot create conflicts with the Seventh Circuit's preemption decision in this case.

The circuit court decisions of *Waller*, *Bollman Hat Company*, *Cagle*, *Ryan* and *Barnes* are not in conflict with the Seventh Circuit's decision in the present case which allowed, based on the factual record, the common fund doctrine to reduce petitioner's recovery. In these cases, the court looked to the subrogation provision and interpreted its terms in determining whether a common law principal would affect subrogation rights.[5] These cases could be said to stand for the proposition that specific unambiguous language in a subrogation provision, purporting to override common law to the contrary, will be enforced as written and will override common law doctrines. However, as Judge Easterbrook noted in the Seventh Circuit's decision in the present case, those facts were not present here. There is no evidence in the record that petitioner's subrogation provision contained terms overriding common law doctrines.

5. *Waller*, 120 F.3d at 1440-1441, *Bollman Hat Company*, 112 F.3d at 116-117, *Cagle*, 112 F.3d at 1521-1522, *Ryan*, 78 F.3d at 127 and *Barnes*, 64 F.3d at 1395.

The Court should not accept *certiorari* because the present case does not conflict with the cases relied on by petitioner and the factual record is incomplete.

The Seventh Circuit in the present case properly followed this Court's precedent in *New York State Conference of Blue Cross & Blue Shield Plans v. Travelers Insurance Company*, 514 U.S. 654 (1995) in holding that the Illinois common fund doctrine is not preempted by ERISA's supersedure provision. This Court has said that state laws of general applicability which impose some burdens on the administration of ERISA plans do not "relate to" them within the meaning of section 514(a) of ERISA. *Travelers*, 514 U.S. at 668. The Illinois common fund doctrine is a state law of general applicability. Instead of burdening the administration of ERISA plans, the common fund doctrine may decrease their operating costs.[6] Judge Easterbrook, in the present case, noted that the common fund doctrine may decrease the plan's cost to collect its subrogation recovery because of economies using one lawyer. There is no need for this Court to once again review a state law of general applicability that does not "relate to" employee benefit plans within the meaning of section 514(a) of ERISA. And there is no need to accept *certiorari* because there was no misapplication of the *Travelers* precedent.

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6. Under the Illinois common fund rule, plan administrators will always have three options in enforcing subrogation clauses and they are free to choose the cost effective option:

1) rely on the legal services of the injured plan participant's attorney and accept application of the common fund doctrine;

2) intervene in the plan participant's lawsuit; or

3) file its own lawsuit.

Consequently, ERISA's federal uniform regulatory scheme remains unimpaired.

CONCLUSION

For the foregoing reasons, the petition should be denied.

Respectfully submitted,

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APPENDIX A — PETITION TO ADJUDICATE SUBROGATION CLAIM DATED JANUARY 4, 1996

STATE OF ILLINOIS
IN THE CIRCUIT COURT OF THE 17TH JUDICIAL COURT
COUNTY OF WINNEBAGO

Case No. 94 L 352

RONALD BLACKBURN and BARBARA BLACKBURN,

Plaintiffs,

v.

BRYAN BECKER,

Defendants,

RONALD BLACKBURN and BARBARA BLACKBURN,

Petitioners,

v.

SUNDSTRAND CORPORATION,

Respondent.

PETITION TO ADJUDICATE SUBROGATION CLAIM

Now come the petitioners, Ronald Blackburn and Barbara Blackburn, by Brassfield, Cowan & Howard their attorneys, and say as follows:

1. This is a suit for personal injuries arising out of a motor vehicle collision.

2. Plaintiffs filed suit against the tortfeasor, and that claim has been settled for $100,000.00 for Ronald Blackburn's personal injuries and $5,000.00 for Barbara Blackburn's personal injuries.

3. The petitioner, Ronald Blackburn, was previously employed by the Respondent, Sundstrand Corporation. He was laid off, and pursuant to the provisions of COBRA he continued his medical hospital insurance through Sundstrand Corporation, with Mr. Blackburn paying the premiums for this insurance.

4. Sundstrand Corporation paid medical expenses incurred by Mr. and Mrs. Blackburn for their injuries caused by the tortfeasor. Sundstrand claims subrogation in the amount of $26,830.92.

5. The settlement against the tortfeasor was obtained entirely through the efforts of Brassfield, Cowan & Howard, attorneys for the petitioners. The settlement was not produced in any way through the efforts of Sundstrand Corporation or its attorneys.

6. Brassfield, Cowan & Howard has a written contingent fee agreement with the Blackburns, wherein the Blackburns agreed to pay 1/3 of any settlement to their attorneys plus expenses.

7. The Blackburns have incurred $1,125.87 in litigation expenses.

8. On December 19, 1995 counsel for the petitioners advised counsel for Sundstrand Corporation that the petitioners were willing to reimburse Sundstrand Corporation for its

subrogation, less attorneys fees of 1/3 and a pro-rata share of the litigation expenses in accordance with *Baier v. State Farm Insurance Co.*, 66 Ill.2d 119 (1977) and the so called common fund doctrine.

9. In a letter dated December 22, 1995, counsel for Sundstrand Corporation refused the request of petitioners' attorneys for reimbursement of their attorney's fees and pro-rata litigation expenses, claiming preemption by the Employee Retirement Income Security Act of 1974 (ERISA) 29 U.S.C. 1144(a).

10. Under Illinois law, the common fund doctrine is not preempted by ERISA. The fund doctrine will be applied not withstanding claims that ERISA preempts state law. *Scholtens v. Schneider*, 274 Ill. App. 3d 102 (1st Dist. 1995). See also *Kelleher v. Hood*, 238 Ill.App.3d 842, 850 (2d Dist. 1992).

WHEREFORE the petitioners ask that the court enter an Order adjudicating respondent's subrogation claim, and ordering that the subrogation claim be reduced by 1/3 plus the respondent's pro-rata share of petitioners' litigation expenses.

RONALD BLACKBURN and
BARBARA BLACKBURN,
Petitioners,

BRASSFIELD, COWAN & HOWARD,
Their Attorneys,

s/ Alfred W. Cowan
ALFRED W. COWAN

Appendix A

STATE OF ILLINOIS)
) SS.
COUNTY OF WINNEBAGO)

Under penalties as provided by law pursuant to Section 1-109 of the Code of Civil Procedure, the undersigned certifies that the statements set forth in this instrument are true and correct, except as to matters therein stated to be on information and belief and as to such matters the undersigned certifies as aforesaid that he verily believes the same to be true.

s/ Alfred W. Cowan
ALFRED W. COWAN

BRASSFIELD, COWAN & HOWARD
1107 Rockford Trust Building
P.O. Box 590
Rockford, IL 61105
(815) 968-8878
Firm No. 561

Appendix A

PROOF OF SERVICE

Under penalties as provided by law pursuant to Section 1-109 of the Code of Civil Procedure, the undersigned certifies that a copy of the foregoing was served upon the following:

Mr. Robert Quick
Human Resources Counsel
Sundstrand Corporation
4949 Harrison Avenue
P.O. Box 7003
Rockford, Illinois 61125-7003

Mr. Dennis Cotter
Querrey & Harrow
Stewart Square, Ste. 420
308 West State Street
Rockford, Illinois 61101

by enclosing same in an envelope addressed to them with postage fully prepaid and by depositing said envelope in a U.S. Post Office Mail Box in Rockford, Illinois on the 4th day of January, 1996.

s/ Rosanne T. Quick

BRASSFIELD, COWAN & HOWARD
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(815) 968-8878
Attorneys for Petitioners.
Firm No. 561

APPENDIX B — NOTICE OF REMOVAL FILED FEBRUARY 2, 1996

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF ILLINOIS
WESTERN DIVISION

Case No. 96C50027

RONALD BLACKBURN and BARBARA BLACKBURN,

Plaintiffs,

v.

BRYAN BECKER,

Defendants,

RONALD BLACKBURN and BARBARA BLACKBURN,

Petitioners,

v.

SUNDSTRAND CORPORATION,

Respondent.

NOTICE OF REMOVAL

Sundstrand Corporation hereby notifies plaintiffs Ronald Blackburn and Barbara Blackburn of its removal of its Petition to Adjudicate Subrogation Claim brought in the Circuit Court of the 17th Judicial Circuit, County of Winnebago, State of Illinois entitled Case No. 94 L 352. In support of said Notice of Removal Sundstrand Corporation states as follows:

Appendix B

1. It has been served with the "Petition to Adjudicate Subrogation Claim" by means of a letter and Notice of Hearing addressed to Mr. Robert Quick, Human Resources Counsel for Sundstrand Corporation.

2. Sundstrand Corporation has received no other pleadings from the plaintiff in its state court action.

3. The underlying dispute between plaintiffs and Sundstrand Corporation is a federal question with original jurisdiction vested in this Court pursuant to 29 U.S.C. 1444, *et. seq.*, Employee Retirement and Income Security Act (hereinafter "ERISA").

Venue is proper in the United States District Court for the Northern District of Illinois, Western Division, premised on 29 U.S.C. 502(e)(2) which provides, in relevant part, that venue is proper in the judicial district in which the ERISA-qualified plan is administered.

WHEREFORE, Sundstrand Corporation prays this Court remove the Petition to Adjudicate Subrogation Claim brought by the plaintiffs from the Circuit Court of the 17th Judicial Circuit, County of Winnebago, State of Illinois, to the United States District Court for the Northern District of Illinois, Western Division.

SUNDSTRAND CORPORATION

s/ Patrick J. Winn
By: Patrick J. Winn
One of its Attorneys

Appendix B

Patrick J. Winn
SUNDSTRAND CORPORATION
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